



Burnside, J. (2018). Jeremy Bentham and the Problem of the Authority of Biblical Law. In R. Ahdar (Ed.), *Research Handbook in Law and Religion* (pp. 53-78). (Research Handbook). Edward Elgar Publishing. <https://doi.org/10.4337/9781788112475.00011>

Peer reviewed version

Link to published version (if available):
[10.4337/9781788112475.00011](https://doi.org/10.4337/9781788112475.00011)

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Jeremy Bentham and the Problem of the Authority of Biblical Law

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I INTRODUCTION

Biblical law is foundational to Western law and civilisation. This makes its inclusion in a research handbook on law and religion necessary. At the same time, the modern world is constructed in such a way that we do not engage with the Bible, or biblical law, seriously. This makes its inclusion in the present handbook vital. Yet we do not have to go back very far to discover evidence of substantial knowledge of, and dialogue with, biblical law amongst philosophers.¹ Such is the case with the leading English philosopher Jeremy Bentham (1748-1832).² Modern readers would hardly know of this because Bentham's interest in biblical law is not discussed in secondary literature.³ Yet his writings disclose substantial engagement with the subject. This chapter explores Bentham's engagement with the authority of biblical law.

* I am grateful to Prof Nicholas Aroney (Queensland), Prof Bernard Jackson (Manchester) and Prof Julian Rivers (Bristol), as well as an anonymous reviewer for this volume, for their responses to an earlier draft of this paper. The usual disclaimers apply. Biblical quotations are drawn from the English Standard Version (ESV) translation of the Holy Bible.

¹ Yoram Hazony, *The Philosophy of Hebrew Scripture* (Cambridge, Cambridge University Press, 2012).

² Bentham's detailed knowledge of biblical law is seen in his reference to biblical legal practices such as those of 'grasping the horns of the altar' (eg 1 Kings 1:50, 2:28) rending the clothes and crying blasphemy (Matt 26:65; Mark 14:63-64); *A Comment on the Commentaries and A Fragment of Government* (J H Burns and HLA Hart (eds); Athlone, University of London, 1977) 21.

³ The only example I have found is David Baumgardt, *Bentham and the Ethics of Today* (Princeton, Princeton University Press, 1952) 98-105, although Baumgardt makes no attempt to subject Bentham's claims to critical scrutiny.

The authority of biblical law is especially problematic in a modern context. Of course, all law must deal with the problem of heteronomy, viz, the existence of authority outside our wills to which we ought to defer. It demands we lay aside our independent moral authority.⁴ In practice we are happy to surrender this in deference to certain forms of authority, such as scientific authority.⁵ We may also be content to do so in regard to laws we think are legitimate. But it goes against the grain to surrender it to divine authority.⁶ Of course, matters are more complicated than this and, certainly, biblical law does not know of any such blind submission.⁷ But we are talking about modern perceptions—and few have shaped these more than Bentham. For all his faults,⁸ Bentham is credited with giving a new foundation to classical liberalism⁹ and is said to reflect ‘some of the important assumptions, values and prejudices that have gone into the composition of the modern Western civilisation.’¹⁰ It is his perspective that is implicit in the ideal of modern law which affects our whole culture and which even affects our idea of rationality.

In Bentham, then, we have a discussant who both embodies modernity and who addresses perhaps the most contentious aspect of biblical law, namely its authority.¹¹ Indeed,

⁴ HLA Hart, *Essays on Bentham* (Oxford, Oxford University Press, 1982) 253 and see further the discussion in Joseph Raz (1985) 14 *Phil & Public Affairs* 3.

⁵ I may not understand quantum mechanics but I respect the authority and status of physicists who tell me what quantum mechanics is.

⁶ The assertion of ‘scientific truth’ to the detriment of other claims to truth including, most of all, ‘religious truth’ is a matter of social construction.

⁷ *Torah* is not given at Sinai as a series of arbitrary injunctions, nor is it received in a spirit of submissive discipline. Rather, it is given by a beloved creator and received by collective and popular acclamation (Exodus 19:8). The people agree to take part in a universalist project – to be ‘a kingdom of priests and a holy nation’ (Exodus 19:6) – a task that ‘must be undertaken with cooperation and free initiative’ (Joshua Weinstein, ‘Between normativity and givenness,’ unpublished paper delivered at Templeton Conference on *Torah From Heaven*, 21 June 2017).

⁸ Still one of the best all-round critiques of Bentham is given by William Whewell in his *Lectures on the History of Moral Philosophy* (1862), reprinted as ‘Bentham’ in Bhikhu Parekh (ed), *Jeremy Bentham: Ten Critical Essays* (London, Frank Cass, 1974) 41-61.

⁹ Bhikhu Parekh, ‘Introduction’ in Bhikhu Parekh (ed), *Bentham’s Political Thought* (London, Croom Helm, 1973) 13, 44.

¹⁰ Parekh, ‘Introduction’ in Parekh, *Jeremy Bentham*, vii - xxvii, vii.

¹¹ ‘Law’ in the Bible is not presented as being any more or less authoritative than, say, the genres of wisdom, poetry or narrative also found in the Bible—on the contrary, all Scripture is presented as the living Word of God (eg Matthew 4:4; 22:31 and 2 Timothy 3:16). Nevertheless, to our ears, biblical law strikes us as emphatically authoritative, at least in terms of its ‘tone and intent’ (Nicholas Aroney, ‘Divine law, religious ethics, secular reason’ (2013) 14 *Political Theology* 670). Much could, of course, be said about how the Bible understands

the rise of modernity and the problematizing of the authority of biblical law are deeply connected. This chapter examines Bentham's idea of biblical law and his reasons for rejecting its authority. These are worth exploring, for several reasons. First, they are the views of a leading legal positivist whose beliefs have shaped ideas of modern law. Not only that, but they have even affected our thinking about biblical law as well. Second, Bentham's views anticipate modern denials regarding the authority of biblical law. Third, despite its significance no-one, as far as I am aware, has analyzed this material.

II BENTHAM'S IDEA OF BIBLICAL LAW

Bentham's discussion of biblical law is set out in *A Comment on the Commentaries*, written in the 1770s but never completed. The incomplete status of some of Bentham's work is one of the challenges with which Benthamite scholarship must contend. At least the *Comment* saw the light of day; more than 180 years after Bentham's death, much of his work remains unpublished.¹² Yet the *Comment* was never abandoned. Dinwiddy tells us that Bentham, aged 80, added a further 300 sheets of manuscript to his original writings.¹³ Clearly, the subject was an itch that never went away.

Bentham's discussion begins with his definition of divine law. He sees '[t]he Law of Revelation, among Christians'¹⁴ as 'divided into two parts: the one containing the Law delivered by Moses: the other containing the Law, as it is called, delivered by Jesus and his Apostles.'¹⁵ We notice at once that Bentham provides us with a secular exposition, from the outset. God is not identified as the original source and both bodies of law are said to be delivered by human beings (Moses, Jesus and the Apostles). We also notice that whereas Moses delivers 'Law', Jesus delivers 'Law, *as it is called*' (emphasis added). Distinctions within 'the Law of Revelation' are thus made on the basis of Bentham's own philosophy of

its own claims to authority. However, this would take us too far afield of the present project; instead, I hope to address this separately in subsequent work.

¹² In 2006, the general editor of *The Collected Works of Jeremy Bentham* estimated that at least another 40 volumes would be required to put previously unpublished material in the public domain.

¹³ John Dinwiddy, *Bentham* (Oxford, Oxford University Press, 1989) 55.

¹⁴ *Comment*, 23.

¹⁵ *Ibid.*

law. This is confirmed when Bentham states that ‘the Law delivered by Moses’ ‘in the strict and proper sense of the word Law, was once a Law.’¹⁶ This is because:

It [the Law of Moses] was a collection of specific commands, delivered to a certain people, expressed in certain terms, affecting specific *objects*, armed with specific penalties, which in point of fact did visibly and presently follow upon disobedience to the commands to which they were annexed.¹⁷

All the hallmarks of Bentham’s legal philosophy are here present. Biblical law is ‘strictly’ defined in terms of a sovereign, commands, subjects, semantic reasoning and enforceable penalties which produce compliant behaviour. The ‘Law of Moses’ further contrasts with ‘the Law, as it is called, delivered by Jesus and his Apostles.’¹⁸ This is

rather a system of moral rules than a Law, and rather a history of transactions from which moral rules may be deduced, than either. [Whereas] The first [ie, the Law of Moses] was the Statute Law of the particular people called the Jews: the second [the Law of Jesus] is given as the Common Law of all nations.¹⁹

Again, biblical law is presented as though it were a modern, positivistic, code (‘the statutes of a particular people’). It is also presented as being opposed to ‘a system of moral rules’ which may be understood and deduced from a wider narrative.

In his opening moves, then, Bentham gives us a thorough-going positivist account of biblical law. This has been remarkably influential. We can easily demonstrate this by comparing his definition of the ‘Law of Moses’ with the up-to-date definition of ‘biblical law’ found in the eponymous entry supplied by the well-regarded *Oxford Encyclopaedia of the Bible and Law*. Here, Wells defines biblical law as neither more nor less than ‘the set of rules found in the texts of the Pentateuch [the first five books of the Hebrew Bible].’²⁰ Tellingly, Wells goes on to claim that the Ten Commandments are ‘less relevant’ to the subject of ‘biblical law’ because the ‘individual statements [of the Ten Commandments] carry no sanctions....’²¹ The assumptions here are pure Benthamite. It is one example among many of how a Benthamite definition of law, or broader philosophy of law, has moulded our understanding of biblical law.

¹⁶ Ibid.

¹⁷ Ibid (emphasis in original).

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Bruce Wells, ‘Biblical Law’ in Brent A Strawn (editor-in-chief), *Oxford Encyclopedia of Bible and Law* (Oxford, Oxford University Press, 2015) 39, 39.

²¹ Ibid.

That said, I am not suggesting Bentham's definition of biblical law has directly influenced modern scholarship. Few biblical scholars have a copy of Bentham's *Comment* on their shelves. But although there is no simple causal connection between Bentham's writings on *torah* and biblical scholarship there are, nevertheless, many stories that could be told, if we had the space, about how Bentham's ideas gained such ascendancy they even affected biblical scholars. They would include accounts of the rise of the modern legislative state in the nineteenth century and the role that Bentham's ideas played—via John Austin and HLA Hart—in securing the dominance of modern positivism. It is not that Bentham's positivism represents a departure from the tradition rooted in Thomas Hobbes (it is Austin who makes the move towards methodological legal positivism). Instead, Bentham is important because he represents a new phase in positivism's articulation of a particular view of political authority and the idea that the authority of law depends on sovereign control in the interests of the people. Bentham is not radical in the Hobbesian sense (although there is, of course, a different, utilitarian, ethic). Rather, his radicalism consists in the way in which he carries through a modernist vision with particular force and rigour and applies it comprehensively. His lasting achievement is to identify what we today regard as the ideal characteristics of lawmaking.²² His positivist ideal of law is implicit in the ideal of modern law which pervades our whole culture. It is rather like living in the shadow of a mountain so large no-one knows it is there. As a result, it is not surprising that Bentham's ideas have even permeated the discipline of biblical studies and are often projected by biblical scholars onto biblical law itself.

This means we are justified in taking Bentham's articulation of *Torah* as a philosophical starting point, even though scholars have been unaware of it for the best part of 200 years. As we rediscover Bentham's thinking on biblical law we find it is powerful and significant because it encapsulates a whole way of thinking about law and doing law—so much so that it even reflects modern scholarly assumptions about how we ought to read *Torah*. There is a parallel here with HLA Hart's rediscovery of Bentham and legal rights; Hart explicitly used Bentham's work on legal rights because Bentham encapsulated a way of

²² It is worth noting here that for Bentham, especially, there is a distinction between definition of the phenomenon, in this case 'law' and its ideal form. His utilitarianism ('the science of legislation') certainly falls into the latter category.

thinking about rights that was deeply significant, even though it had lain dormant for a long time.²³

The problem is that, at point after point, Bentham's ideas do not fit the biblical texts. Of course, there are commands, sanctions and subjects in biblical law.²⁴ But there is much more. For this reason, an adequate definition of biblical law must go beyond classical legal positivism (many would argue that an adequate account of modern law must go beyond this, too). I have argued elsewhere that *torah* (the Hebrew word often translated 'law' but which has the basic meaning of 'instruction' or 'teaching') is an accumulated phenomenon with multiple links to other expressions of normativity in the Bible, including narrative, prophecy and poetry.²⁵ For these and other reasons I define biblical law as 'an integration of different instructional genres of the Bible which together express a vision of society ultimately answerable to God.'²⁶ Moreover, even where commands, sanctions and subjects can be identified in the biblical texts, they are conceived very differently to Bentham. For example, I have argued elsewhere that the biblical account of the Giving of the Law at Mount Sinai (which clearly involves considerations of commands, sanctions and subjects) exposes the inadequacy of a Benthamite conception of law when applied to biblical law.²⁷ All this raises issues and questions that need a different kind of discussion from anything Bentham is prepared to have. The sad result is that, instead of allowing our ideas about biblical law to be formed by the biblical texts, on their own terms, we get them from Bentham. This means that the failure of many generations of scholars even to glimpse the complexity and meaning of biblical law is part of Bentham's legacy.

Having defined biblical law in these restrictive terms, Bentham turns to the question of its authority:

²³ The first authoritative version of Bentham's *Of Laws in General* is attributed to Hart. Joseph Raz credits Hart with being 'the first to explain and discuss in detail Bentham's contribution to jurisprudence'; 'Hart on moral rights and legal duties' (1985) 4 *Oxford J of Legal Stud* 123.

²⁴ *Torah* includes what we would understand as 'rules.' At this level *Torah* is almost synonymous with the word 'commandment' (*mitsvah*).

²⁵ Jonathan Burnside, *God, Justice and Society: Aspects of Law and Legality in the Bible* (Oxford, Oxford University Press, 2010) xxxii. See also Gordon Wenham, *Story as Torah* (Grand Rapids, MI, Baker Academic, 2004) and Gordon Wenham, *Psalms as Torah* (Grand Rapids, MI, Baker Academic, 2012).

²⁶ Burnside, *God, Justice and Society*.

²⁷ Jonathan Burnside, 'Moses *contra* Bentham: How the Giving of the Law at Sinai Challenges Benthamite Jurisprudence' (forthcoming).

The Law of Moses, we are told, had originally, the whole of it, an original binding force of its own over the particular nation to whom it was delivered; and that as well in the character of an expression of the Will of their subordinate human legislator Moses, as in that of an expression of the declared explicit Will of God. It has still, a part of it, a binding force, and that over all nations: for example, over our own: but this no further than it may have been tacitly adopted by Jesus, himself a part of God, the most recent and most authoritative announcer of the will of himself and what remains of God, and by the Apostles, interpreters of the Will of Jesus.²⁸

The description of Moses as a ‘subordinate human legislator’²⁹ again indicates that Bentham’s criterion of ‘binding force’ is his own positivist definition of law, based on human political power. This is in keeping with his earlier, positivist, definition of biblical law. The presentation of Moses in these terms raises the question whether Moses is a ‘sovereign’ in Bentham’s terms or not. Here we should recall that the key definition for Bentham is that law is the command of a sovereign in a State. Since God is not in a State, God cannot be a sovereign. It follows from this that Moses must function here as a Benthamite sovereign because he is the Israelites’ ‘human legislator.’³⁰ Bentham here presents biblical law as ‘positive law’ because Moses was the sovereign and the people were in the habit of obedience to him. At the same time, however, Bentham characterizes biblical law as ‘an expression of the declared explicit Will of God’ and Moses as the representative ‘subordinate’ or delegate of God. In that sense, Bentham’s account of the authority of biblical law tries to have it both ways. Biblical law is both ‘from God’ and ‘from Moses.’ However, we should not put too much weight on Bentham’s reference to the ‘Will of God.’ Bentham is careful to say that this is something we are only ‘told’, so it is not a view to which Bentham is committed and, of course, Bentham does not recognize the ‘Will of God’ as having any ontological or epistemological validity.

In this opening move, then, Bentham chops biblical law to fit his Procrustean bed. At best he does not capture the full picture of biblical law; at worst he prevents us from understanding biblical law as it really is. This means that modern readers must not read biblical law as if Benthamite jurisprudence is our ideal. Biblical scholarship needs to come to terms with Bentham’s influence on legal positivism and, in turn, with the effect of legal positivism on studies in biblical law. Reading biblical law in that direction is wrong. Only when we have deconstructed the influence of Benthamite jurisprudence can we recover a way

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

of thinking about biblical law that does justice to the biblical texts.

Bentham's definition of biblical law forms the background against which he launches his attack on its authority. The remainder of this chapter examines Bentham's arguments with the following questions in mind: (1) What specific arguments does Bentham deploy to overthrow the authority of biblical law?; (2) What does this suggest about how Bentham understands the authority of biblical law?; (3) How strong are these arguments?—all of which lead up to question; (4) Does Bentham successfully engage with the problem of the authority of biblical law? These research questions are important since, as far as I am aware, Bentham's analysis of the Bible has largely escaped critical evaluation. It is time for us to be sceptical about Bentham's scepticism and to turn Bentham's critique upon itself.³¹ In doing so, I seek to challenge Bentham's perspective on biblical law, which derives from his own self-constructed standards of reference, on the basis of an alternative understanding of biblical law. I do not, of course, necessarily expect readers to share this viewpoint regarding the authority of biblical law, or its place within the Christian tradition. On the contrary, I fully expect readers to have a different appreciation of these matters. Nevertheless, I trust that the following argument will serve its purpose as a tool in re-evaluating Bentham, even though readers may not share my particular perspective.

III BENTHAM'S SPECIFIC OPPOSITION TO THE AUTHORITY OF BIBLICAL LAW

The authority of biblical law presents itself most sharply to Bentham by those whom he calls 'sticklers for the universal and perpetual authority of that Law [ie, the Law of Moses].'³² He says that whilst they accept that many of the Mosaic laws 'are of a local nature' (ie, given purely for Israel) and that the reasons behind their use are 'plainly referable to the peculiar circumstances of the people they were given to' they also say that many laws:

are plainly of a nature not local... well suited then to the circumstances of that country [ie, Israel] they were: well suited they now are to the circumstances of this. Not being

³¹ For example, Philip Schofield, *Jeremy Bentham: Prophet of Secularism*, 80th Conway Memorial Lecture (London, South Place Ethical Society, 2012) is content to simply repeat Bentham's exegesis of biblical texts including a supposed homosexual relationship between David and Jonathan and Bentham's claim that Jesus probably engaged in homosexual practices. Regarding the latter, Bentham cites the presence of the young man referred to in Mark 14:51-52 as indicating there was a strong bond between Jesus and a male prostitute. Schofield makes no attempt whatsoever to evaluate the plausibility of these readings.

³² Bentham, *Comment*, 26.

expressly repealed by Jesus, they are therefore still in force. To neglect them is impious.³³

Bentham does not tell us who these persons are. Possibly he refers to them because he wants to engage with the strongest (or most extreme) account of the authority of biblical law. Their views are, impliedly, unrepresentative of the wider Church because, he claims, even the most conventional and well-regarded Christians reject the authority of biblical law:

As to the notion of adopting the Law of Moses in its whole extent, even those articles of it that are of the nature of the political regulations, and in no wise concern the ceremonies of the Jewish religion this has been of late universally exploded by persons of all sects, in particular by writers of our own Church the most orthodox and the most distinguished for their attachment to religion.³⁴

Bentham does not cite any sources for this so, again, we do not know to whom he was referring. But as far as he is concerned ‘neglect of the Law of Moses’³⁵ is the default position, even within the Church. Why, then, should anyone take biblical law seriously?

Bentham thus constructs the argument as though he is defending an apparently standard view within the Christian Church. When he denies the authority of biblical law in the public square he is not, apparently, making a radical religious or political claim. On the contrary, he is merely establishing orthodoxy. This line of argument suits Bentham’s purposes extremely well. He wants to ‘throw off the grip of religion from all areas of public life.’³⁶ Here church leaders, and even the Bible itself, are co-opted to these ends.

Bentham undermines the authority of biblical law on the following grounds: (a) neither Jesus nor the Apostles formally identify a body of binding moral law; (b) the New Testament is inconsistent on the subject; (c) Jesus is inconsistent on the subject, according to the New Testament; (d) Paul’s presentation of the subject is inconsistent; (e) biblical law is ultimately subservient to utility; (f) its proponents are fanatics and lunatics and (g) biblical law is inherently damaging to society. We shall consider each in turn.

A Neither Jesus Nor the Apostles Formally Identify a Body of Binding Moral Law

³³ Ibid.

³⁴ Ibid, [25].

³⁵ Ibid, [26].

³⁶ Schofield, *Prophet of Secularism*, 4.

Bentham is aware of the Christian convention of making distinctions within biblical law. Historically speaking, the tradition of a threefold distinction between ‘ceremonial’, ‘civil’ and ‘moral’ is closely associated with Protestant Reformed theology,³⁷ although the tradition is present in Thomas Aquinas³⁸ and extends as far back as Tertullian in the fifth century,³⁹ at least.⁴⁰ Bentham concerns himself with only one distinction and hence with two potential categories; viz the ‘Ceremonial Law’ as ‘containing what is supposed to have been abolished by Jesus’⁴¹ and the ‘Moral Law’ as ‘containing what is supposed to have been adopted and retained.’⁴² For Bentham, this distinction leaves him ‘a good deal in the dark’⁴³ because:

Jesus has nowhere made any division of the Laws of Moses into two parcels and said of the one parcel, ‘this ye shall obey’, and of the other, ‘this ye shall not obey, or may obey or not as ye think proper.’ Never did Jesus this: never did any Apostle. By no one has it been ever said they did. Not only is it true that neither by Jesus nor by any Apostle have the contents of such respective parcels anywhere been ascertained, but no division into any such two parcels is anywhere expressly mentioned.⁴⁴

This is anathema for Bentham whose entire legal philosophy has as its goal minimizing indeterminacy in the law:

... if it is difficult, as it may be, to say what is the human Common Law, it is a thousand times more difficult to say what is the Divine Law. So that if it be but too easy for a man to find an inlet for his own caprice under shelter of the first-mentioned exception, it is a thousand times more easy under shelter of this last.⁴⁵

It is perfectly true that neither Jesus nor the apostles formally identify a body of binding moral law. However, the real issue is Bentham’s prior commitment to positivist ideas regarding authority and law. Bentham defines law exclusively in terms of the authoritative commands of a (human) sovereign in a state. And since Jesus does not issue a command regarding which parts of the Mosaic law are valid or not, Bentham claims we cannot identify

³⁷ Eg Jean Calvin, *Institutes of the Christian Religion*, Book Fourth, ch 20, s 14.

<https://www.ccel.org/ccel/calvin/institutes.vi.xxi.html>.

³⁸ *Summa Theologica*, 2a, Question 99, Art 4.< <http://newadvent.org/summa/2099.htm>>.

³⁹ Tertullian, *An Answer to the Jews*, chs 2 and 5.

<<http://www.newadvent.org/fathers/0308.htm>>

⁴⁰ See Philip S Ross, *From The Finger Of God* (Fearn, Mentor, 2010) 19ff.

⁴¹ Bentham, *Comment*, 23.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid, [23]-[24]. Baumgardt agrees with Bentham’s analysis: ‘the extent to which the Mosaic Law is binding is so uncertain that this precludes the general validity of any moral rule deducible from the Pentateuch’, *Bentham*, 102.

⁴⁵ Ibid, 200.

which parts of the law are binding. Bentham's objection is thus one of his own making because the authority of biblical law, for Christians, is not grounded in any formal distinction by Jesus or the apostles between different types of law. Bentham's objection that there is no distinction in the New Testament therefore carries no weight.

Instead, the authority of biblical law for Christians is grounded in narrative terms. As far as the New Testament is concerned, the Old Testament is the beginning of The Story which has now reached its climax in the person of Jesus Christ. The book of Hebrews, for example, says that: 'what is becoming obsolete and growing old is ready to vanish away' (8:13). The immediate referent is to the Temple but the writer is also catching up in that other parts of the Hebrew Bible which were good in their time but which are now obsolete in God's purposes.⁴⁶ The 'old' includes everything that distinguished ancient Israel from all the other nations, including its food and purity laws (which are, incidentally, labelled 'ceremonial' laws by some Christian theologians). The point about the food laws (*cf* Mark 7), the distinctive forms of clothing and the ban on planting two kinds of seed in the same field (eg Leviticus 19:19) was to make the Jewish people distinct from the nations and to preserve a measure of separation from Gentiles. This was important because preserving Jewish identity was vital to continuing the story of God working through His chosen people, and ultimately working through a Jewish Messiah. It is precisely because Jesus is understood to have succeeded in abolishing the barriers between humanity and God and between Jews and Gentiles that Christians do not—and must not—practice laws concerned with preserving ethnic and cultic separation. This means that identifying what is normative, and what is not, cannot be determined by reference to a formal source. Instead, it is a function of knowing where you are in the story, for those who are believers in Jesus.

But although there is ethnic discontinuity between the Old and the New Testaments there is also ethnic continuity. The New Testament teaches both that Jesus is the fulfilment of *Torah* (Romans 10:4) and that Jewish and Gentile believers are united in Christ's risen body (Romans 10:12; Colossians 2:9-12). Christians must therefore maintain ethical continuity with *Torah*. Much more could be said on this, but suffice it to say that Gentile (and Jewish) believers in Jesus are in fact obligated to follow a more intensified form of the written *torah* and Jewish practice in terms of, for example, sexual behaviour (1 Corinthians 6:13b-20) and prayer (1 Thessalonians 5:17).

⁴⁶ It should be said in passing that this does not involve any denigration of what is now considered 'obsolete' or 'old', any more than one would scorn a Rolls-Royce that has successfully brought a person to their destination.

To sum up, Bentham misunderstands the sense in which biblical law exercises authority over Christians. He tries to make the Bible fit his preconceived ideas about authority and law. The various continuities and discontinuities between the Old Testament and the New are not grounded in a ‘legislator’ who makes a formal division between different types of law. Instead, they are distinguished narratively, but consistently, in terms of where Christians are located in the story of God and His redemption of creation. Christians can thus be clear about how they are supposed to relate to biblical law, even though neither Jesus nor the apostles make any legislative amendment to the Laws of Moses (which is what Bentham is looking for).

B The New Testament is Inconsistent on the Subject

Bentham’s next criticism follows from the preceding claim and states that the New Testament’s view on the authority of biblical law is inconsistent:

That which the Will of Jesus, and of the Apostles, interpreters of his Will, is to be collected from, is the general aspect of their discourse towards the Law of Moses: now speaking in favour of it, and now in derogation. To speak now in favour, now in derogation of the same whole, would savour, it seems to have been supposed, of levity and inconsistency. It would seem not to be the discourse of a Legislator, much less of a divine one.⁴⁷

Again, the problem is one of Bentham’s making. It arises because of his insistence upon reading biblical law according to his theory of law and rejecting as ‘non-law’ everything that doesn’t fit. Instead of seeking to understand why continuities and discontinuities exist between the Old and New Testaments, Bentham simply plays them off against each other. This allows him to declare they are inconsistent and possess no authority as law.

In doing so, Bentham again fails to understand how biblical law makes claims upon the Christian (see section A above). Nor does Bentham allow for the fact that the meaning of the New Testament word for ‘law’ (*nomos*) is context-dependent. There are certainly times when the apostles—Paul, in particular—speak positively about ‘the law’ and times when they do not. But these variations arise because the different contexts concern right and wrong *uses*

⁴⁷ Bentham, *Comment*, 24. Baumgardt again concurs with Bentham: ‘... genuine moral laws cannot be derived from either part of the Law of Revelation: neither from the Old Testament, primarily because it is not clear to what extent its law still has binding force; nor yet from the New Testament, because there is no definitive law therein formulated. In other words, in the former case there exists a Law, but it is not strictly obligatory; in the latter case there exists binding force, but not a sufficient number of explicit moral laws’; *Bentham*, 103.

of the law, not the nature of the law itself. Jesus himself challenged unacceptable interpretations of the *Torah* and put forward His own authoritative interpretations on key issues (eg Matthew 5:21-48); likewise, Paul challenges wrongful interpretations of the law, and upholds the right use of the law, for followers of Jesus. For example, in the early church, some argued that obeying circumcision and food laws was necessary for salvation (Galatians 2:12). This was a wrong use of the law because (as noted in the previous section) Jesus came to abolish ethnic distinctions between Jews and Gentiles. Re-establishing ethnic divisions is thus a denial of the Gospel. But to speak of a wrongful way of using the law is to uphold a proper use of the law, such as found in Romans 7:12 ('So the law is holy, and the commandment is holy and righteous and good'). As noted in the previous section, the authority of biblical law is grounded in a narrative understanding of what is and is not normative, given the significance that is attached to the life, death and bodily resurrection of Jesus. This accounts for the continuities and discontinuities. The New Testament takes *Torah* extremely seriously but, as the Gospels and Epistles make clear, it is *Torah* understood under Jesus' direction.

C Jesus is Inconsistent on the Subject, According to the New Testament

Another difficulty, claims Bentham, is Jesus' own attitude towards the Law. He writes: 'As to Jesus, we find him treating the Law itself with contempt, and the adherents to it with ridicule.'⁴⁸ Bentham initially tries to resolve the tension by noting Jesus' attitude is apparently in respect of 'the ceremonial part.'⁴⁹ However, this does not resolve the problem since Bentham notes that the law commanding circumcision belongs to 'the ceremonial part'⁵⁰ which Jesus apparently despised—yet 'he himself was circumcised.'⁵¹ In addition, 'we find the same Jesus declaring of the whole law in general, that he came not to destroy but to fulfil it.'⁵² Bentham's argument here runs along similar lines to section B above: Jesus' handling of the various laws is inconsistent, therefore the laws cannot either be rational or the product of a rational sovereign.

⁴⁸ Ibid, [24].

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

Certainly, Jews were scandalized by Jesus' radical attitude toward contemporary interpretations of the Sabbath and purity laws (Matthew 12:1-14; Mark 7:1-23) as well as other Jewish traditions which he stated negated *Torah* (Mark 7:8-13). However, Bentham's presentation is again misleading and inadequate. Jesus' radicalism stems from his identity as the authoritative mediator of *Torah* who can set out the definitive exposition of the law (Matthew 7:28-29). Sometimes this virtually amounted to the promulgation of new law. There was a fine line between this and the accusation that Jesus was abolishing 'the law and the prophets'; a charge Jesus expressly denies. Indeed, Jesus' claim to fulfil *Torah* (Matthew 5:17) entails a positive evaluation of that which is being fulfilled.

Though it would take too long to illustrate this fully, Jesus' reworking, redefining and categorizing of *Torah* around himself is consistent with the radical way in which he redraws other key aspects of Jewish praxis, including Temple, land, family, 'zeal', prayer and Scripture.⁵³ All are radically redefined around who Jesus is; none are left untouched. Thus, Jesus displaces the Temple as the place where the people meet with God (eg Matthew 12:6) and where forgiveness is pronounced (eg Matthew 9:1-8); the whole earth becomes the inheritance of Israel's Messiah (eg Matthew 28:18-20); traditional boundary markers between Jew and Gentile are abolished (eg Ephesians 2:14); blood ties are subordinated to primary allegiance to Jesus (eg Matthew 10:37); nationalist zealotry is transposed from ethnic to cosmic and spiritual battle (eg Ephesians 6:12); prayer now takes place all the time (eg 1 Thessalonians 5:17) in the spirit to God as father through Jesus the Lord (eg Ephesians 5:18b-20) whilst all the Scriptures become a collective witness to the person and work of Jesus (eg Luke 24:27).

The point is that Bentham's attempt to play a few texts off against each other to derive an apparent contradiction does not even begin to engage with what is actually going on in the New Testament, namely, the creation of a newly-crafted symbolic universe that redraws Jewish social praxis whilst remaining within a thoroughly distinctive Jewish worldview.

D Paul's Presentation of the Subject is Inconsistent

Bentham's fourth point is closely related to section C, above, namely, that the apostle Paul is equally inconsistent in his handling of biblical law. 'For all this an Apostle scrupled not to say that neither circumcision availed anything, nor uncircumcision [a reference to Galatians 5:6

⁵³ NT Wright, *Paul and the Faithfulness of God* (London, SPCK, 2013) 354-375.

and Galatians 6:15]; while the same Apostle says in another place....⁵⁴ Here, a space is left in Bentham's manuscript with jottings that state: 'Peter Paul – Meats. Unclean things – blood.'⁵⁵ The former certainly refers to the dispute between Peter and Paul regarding table fellowship with Gentiles (Galatians 2:11ff) whilst the latter may refer to the decision of the Council of Jerusalem regarding Gentile Christians (Acts 15:1-35; Galatians 2:1-10).

Once again, Bentham misunderstands the issues.⁵⁶ Regarding circumcision, the verse Bentham quotes ('For neither circumcision counts for anything nor uncircumcision, but keeping the commandments of God'; 1 Corinthians 7:19) is an 'obvious oxymoron'⁵⁷, not least because circumcision itself is commanded in biblical law (eg Leviticus 12:3)! Again, the issue is not one of 'inconsistency' but of covenantal eschatology. Since in the Messiah, God has unveiled his purpose of making one family and one people, to insist on markers of division denies the Messiah himself and his achievement. Elsewhere, in Romans 4, Paul argues that since Abraham himself was uncircumcised at the time of the covenant in Genesis 15, circumcised Jews are incorporated into a family of uncircumcised covenant members, beginning with Abraham himself.⁵⁸ Consequently, it is not circumcision that is the badge of belonging to God's covenant people but faith or faithfulness (*pistis*, in Greek), that is, the faith shown by Abraham whilst still uncircumcised and the faithfulness displayed, supremely, by Jesus himself. Again, it is wholly inadequate to present this as 'inconsistency.' Symbols are here being recast, this time in terms of a long-standing Jewish debate regarding 'circumcision of the heart' (Romans 2:25-29; cf Deuteronomy 10:16; 30:6).

The debate around table-fellowship, which Bentham also brings up, plays out in a similar way. Since the loving and saving death of the Messiah 'has made us both one and has broken down in his flesh the dividing wall of hostility' (Ephesians 2:14) that existed between Jews and Gentiles, Messianic Jews and Gentiles who eat at different tables are effectively saying that the Messiah might as well not have died. Paul thus regards it as 'absolutely imperative that all those 'in the Messiah' belong at the same table.'⁵⁹ As Wright puts it 'the unity of the Messiah's people has taken the place, within the community-defining symbol-

⁵⁴ Bentham, *Comment*, 24.

⁵⁵ Noted by Burns and Hart, *Comment*, 24, n 6.

⁵⁶ Unaware of the irony, Bentham doubts the ability of interpreters to correctly interpret the texts (*Comment*, 28) and patronisingly considers that 'Hebrew is a fine language for the expression of simple ideas' (*Works*, vol 10, 583).

⁵⁷ Wright, *Paul*, 361.

⁵⁸ *Ibid*, [363].

⁵⁹ *Ibid*, [359].

system, of the socio-cultural identity of the strict Jew'.⁶⁰ At the same time, 'the new Messianic law of who you can eat with is...used to *exclude* those whose behavior has effectively denied that they belong to the Messiah in the first place' (emphasis original)⁶¹, namely, those who are 'guilty of sexual immorality or greed, or is an idolater, reviler, drunkard, or swindler' (1 Corinthians 5:11). Table-fellowship is thus a good example of how the authority of biblical law is meant to play out in church life; there is ethnic discontinuity between the Old and New Testaments but there is also ethical continuity. Paul is every bit as concerned about purity and table fellowship as he was in his former life as Saul the Pharisee; the difference is that, in the Messiah, the boundaries are radically redrawn. 'The [Messianic] community is defined by the Messiah, and by faithfulness to him... [and] the sacrificial death by which his own faithfulness was acted out.'⁶²

Again, it is not sufficient to simply pit a few texts against each other, even allowing for the fact that, like any author, Paul may be allowed to vary his emphases in the light of his particular audiences and purposes. We are not dealing with inconsistency, *per* Bentham. Instead, we are dealing with a redrawn social praxis, with new symbolic markers, within the same, Jewish-style, creational and covenantal monotheism.

E Biblical law is Ultimately Subservient to Utility

The next stage of Bentham's argument follows from his preceding claims regarding inconsistency. Bentham states that the lack of any clear guidance as to what belongs to the 'ceremonial' and the 'moral' law means theologians have been left to make this distinction for themselves. This means there is no secure basis for identifying the scope of the 'moral' law which binds Christians. Bentham asserts that theologians distinguish between the two groups according to 'the general or particular utility of ... the regulation in question.'⁶³

Coming from God they [i.e. the biblical laws] must all of course possess a certain utility, or at least a certain worth equal or superior to use. Every article then being useful, if *generally* useful to all who should observe it, of any other nation as well as of the Jewish, it is an article of the moral Law and as such belongs to us who are never mentioned by it, as well as to the Jews to whom it was delivered. If no utility can be

⁶⁰ Ibid, [360] (emphasis removed from original).

⁶¹ Ibid.

⁶² Ibid.

⁶³ Bentham, *Comment*, 25. Baumgardt concurs: 'The logical conclusion... is that only the principle of utility, not any divine law, decides what is morally right or wrong....' (*Bentham*, 104).

found or supposed in our observing it, its utility is then of the special kind, and it belongs not to us, but belongs only, that is, belonged formerly to the Jews.⁶⁴

This means that:

with respect to such articles as are now useful, these it is now proper for us as Legislators to cause to be observed; as subjects, to observe... But under this explanation how can any human Law be contrary to this part of the Law of God, unless in as far as it is contrary to utility: that is, how can any man complain of such human law and argue for its being disobeyed on any other ground than that of his thinking it inexpedient?⁶⁵

If even theologians use utility to identify which divine laws are valid, the authority of biblical law is ultimately grounded, not in its divinity but in its utility.⁶⁶ Bentham does not cite any examples of theologians who behave in this way, which is unfortunate since his claim at this point is self-serving. But his assertion is consistent with his claim, made earlier in the document, that commitment to the ‘moral’ law means reconciling the Mosaic Law ‘to our notions of that knowledge of human nature which teaches how to settle the purport of a Law, and of that knowledge of language which teaches how to fix upon the expression.’⁶⁷ In other words, the moral law is relevant only to the extent that it adheres to the modern idea of Law that is clear and rational. By these means, Bentham makes the Bible subservient to his principle of utility:

To the dictates of this principle [utility], then, in any case what is given for a dictate of the Law of Revelation is either opposite or conformable. If opposite, what is given for the dictate of the Law of Revelation must be rejected... If conformable, that consideration is of itself reason sufficient for adopting of the measure: that alone fully justifies it....⁶⁸

⁶⁴ Bentham, *Comment*, 25b (emphasis in original).

⁶⁵ Ibid.

⁶⁶ Bentham’s disciple Austin makes a slightly different claim which relates, not to God’s revealed law, but to God’s unrevealed law: ‘the benevolence of God, with the principle of general utility, is our only index or guide to his unrevealed law’; John Austin, *The Province of Jurisprudence Determined* (Wilfrid E Rumble (ed); Cambridge, Cambridge University Press, 1995) 41. Cf ‘The whole of our conduct should be guided by the principle of utility, in so far as the conduct to be pursued has not been determined by Revelation’ (ibid, 45; emphasis in original).

⁶⁷ Bentham, *Comment*, 24.

⁶⁸ Ibid, [27]-[8].

Moreover, if biblical law is ultimately subordinate to the principle of utility it has value only insofar as it motivates citizens to act on that basis. ‘Revealed Theology’⁶⁹ or ‘Divine Law,’ like ‘natural Theology,’ is helpful only to ‘Legislation’ when it ‘suggest[s] motives to governors to adopt and to people to submit to such regulations as by other considerations shall have been determined to be proper.’⁷⁰ Biblical law cannot be consulted for a ‘precept’, though it may provide ‘*evidence* of a sanction.’⁷¹ It has no greater significance than, say, Melanesian frog worship, if the latter can manipulate some citizens to obey the law.

Finally, utility is used as a necessary, if not sufficient, test of the authenticity of revelation itself:

... if we lay it down as a fixed principle that whatever Laws have been given by the Author of Revelation were meant by him to be Laws subservient to the happiness of the present life, that this subserviency is an indispensable evidence of the authenticity of what are given for such Laws, that is, of their really coming from him, to know whether a measure is conformable to the dictates of the principle of utility is at once the readiest and the surest way of knowing whether it is conformable to the dictates of the Law of Revelation.⁷²

It is a kind of reverse alchemy; Bentham wants to take the gold of *Torah* and transmute it into the base metal of utilitarianism.

However, contrary to Bentham’s assumptions, it remains the case that Christians can know the divine will independent of ideological claims to utility. First, as noted in section B, above, Christians have an alternative, consistent, basis for determining the continuing authority of biblical law. It is not dependent on utility. Second, Christians do not have to assume utility as the arbiter of biblical law because biblical law is not itself the product of autonomous reason. It is hard to imagine how either autonomous reason or the principle of utility could have given rise to the sort of radically egalitarian society we find described in biblical law (eg in regard to the distribution of land and political power).⁷³ All political revolutions benefit one social group or another and altruistic political revolutions are as unknown in the ancient world as they are in the modern. And since no single social group benefits from the political society found in biblical law there is no reason for it to have arisen.

⁶⁹ Bentham defines ‘Revealed theology’ as ‘that which professes to teach what is called the Revealed Law, the Law of Revelation’ which consists he says, for Christians, in ‘the Law delivered by Moses’ and ‘the Law... delivered by Jesus and his Apostles’; *Comment*, 23.

⁷⁰ Bentham, *Comment*, 22.

⁷¹ Ibid, [23](emphasis in original).

⁷² Ibid.

⁷³ Berman, *Created Equal*.

In this regard, the revelation at Sinai is a rebuke to autonomous reason because neither reason nor utility is capable of producing the sort of society found in biblical law. Nor does revelation have to be subordinated to reason in order to be reasoned about, not least because, as Hazony has argued at length, ‘the texts of the Hebrew Bible... are in fact much closer to being works of reason than anything else.’⁷⁴

F Its Proponents are Fanatics and Lunatics

This brings us to one of the least edifying of Bentham’s arguments. Burns and Hart find a note from Bentham’s *Inserenda* which, they say, although not expressly marked for inclusion, nevertheless seems to belong at this point in the *Comment*.⁷⁵ This is because of Bentham’s reference to the page numbers of Blackstone’s *Commentaries on the Laws of England* (1765-1769). Bentham quotes from Sir William Blackstone as follows:

... it is an established rule to abide by former precedents... Yet this rule admits of exception, where the former determination is most evidently contrary to reason; much more if it be contrary to the divine law.⁷⁶

The idea that human law is not absolute and that rulers are called to give an account before God would have been anathema for Bentham for it would have meant, for him, the end of political society. Not only is biblical law inherently uncertain, it makes human law uncertain and might encourage disobedience among the population:⁷⁷

When somebody who pretends to be versed in the Law of Revelation or in the non-identity of the Law of Nature gives the word and pronounces one of these Laws to be counteracted by any human Law, then it is that this human Law, come what will of it,

⁷⁴ Hazony, *Philosophy*, 3.

⁷⁵ *Comment*, 27, n 2.

⁷⁶ *Commentaries on the Law of England*; I Comm 69-70. Note that Austin finds room for biblical law (as a form of religious law) within his definition of ‘law properly so called.’ ‘the laws of God, are laws set by God to his human creatures... they are laws or rules, *properly* so called’ (*Province*, 38; emphasis in original). In contrast to Bentham, Austin also states that ‘certain of God’s *laws* were as binding on the first man, as they are binding at this hour on the millions who have sprung from his loins’ (*Province*, 28; emphasis in original). For a discussion of the difference between Bentham and Austin on this point, see Bernard S Jackson, ‘Structuralism and the notion of religious law’ (1982/3) 2/3 *Investigaciones Semioticas* 1.

⁷⁷ ‘We must always remember that out of the whole of what has been ever called the Divine Law, our Author makes no exception. It is all brought up to set in array against the Law of the Land; Mosaic Law and all’; Bentham, *Comment*, 200.

is to be transgressed. A doctrine more favourable to the enterprizes of fanatics could not have issued from the school of Loyola.⁷⁸

Hart sees the latter reference as denoting those writers who have contended that subjects are justified in resisting, deposing and even killing ruling tyrants.⁷⁹ Bentham sums up with the slogan: ‘Farewell Law and Common Sense: Welcome, Fanaticism....’⁸⁰

And hello lunacy. Referring to Blackstone’s quotation, Bentham writes:

This distemperature of the brain is not a mere transient delirium: it is a confirmed lunacy permanently seated in the brain and breaking out at distant intervals.... He [Blackstone] is there [in the *Commentaries*] speaking of the rule of judicial decisions, ‘to abide by former precedents’: that this is an established form: he then tells us it admits of an exception: and that is ‘where the former determination’ is contrary to the divine law and that ‘much more’ than if it be ‘*most* evidently contrary to reason.’ I would not be impertinent: and yet I have curiosity. I wonder how he has managed ... in these sentiments he has kept his foreskin’⁸¹

The latter is a reference to circumcision as the sign of the covenant between God and Abraham’s descendants (though for Bentham’s misunderstanding of the circumcision laws under the new covenant see section D, above). Bentham here labels those who hold to the authority of biblical law as lunatics.

Finally, there is more than a hint of anti-Semitism in Bentham’s speculation on whether Blackstone has kept his foreskin since its rhetorical force presupposes the unacceptability of a distinctively Jewish contribution. Bentham is saying that only a Jew could make such a stupid point about the overriding nature of divine law. It is tantamount to accusing Blackstone of being a Jew in secret in a way that implies to be Jewish is a slur. Bentham’s allegation of being a crypto-Jew may not, sadly, have been unusual for the times. The outcry in 1753 over the Jew Bill indicates how, in the words of Horace Walpole—the leading historian of the age—mid-eighteenth century England ‘was still enslaved to the grossest and most vulgar prejudices.’⁸² It is another low point in Bentham’s argument. Here, as elsewhere, the violence of his rhetoric makes us wonder what is really at stake. We shall return to this further below.

⁷⁸ Bentham, *Comment*, Appendix F, 346.

⁷⁹ Burns and Hart, *ibid*, n 3.

⁸⁰ Bentham, *Comment*, 200.

⁸¹ *Ibid*, 26-27 (original emphasis).

⁸² Cited in David S Katz, *The Jews in the History of England* (Oxford, Oxford University Press, 1994) 240. I have not had access to the original source.

G Biblical law is Inherently Damaging to Society

Bentham draws on Edmund Burke's, *An account of the European settlements in America*,⁸³ to claim that all attempts to apply biblical law in society are inherently damaging:

The people who composed the new colonies' (speaking of America) it has been observed by an historian of the first eminence 'imitated the Jewish polity in almost all respects; and adopted the books of Moses as the Law of the Land.' This the historian scruples not to speak of as being the effect of a 'contracted way of thinking and most violent enthusiasm.' 'The first laws which they made' (continues he) 'were grounded upon them' (upon the books of Moses) 'and were *therefore* very ill suited to the customs, genius or circumstances of that country, and of those times; for which reason they have since fallen into disuse.'⁸⁴

Bentham here endorses Burke's view that the sort of people who are interested in applying biblical law are narrow-minded and dangerous bigots. It resonates with Bentham's labelling of such persons as fanatics and lunatics (see Section F). Elsewhere in the *Comment*, Bentham deploys the experience of 'the deluded people of the Massachusets (*sic*)'⁸⁵ whose belief in witchcraft—informed by biblical law—'tainted the air with the pestilence of murdering perjury, and the land with innocent blood.'⁸⁶

However, there are problems with Bentham's argument. First, Bentham uncritically accepts Burke's claim that the American colonies wholly abandoned their commitment to the application of biblical law. This was a premature judgement on Bentham and Burke's part. Neither reckoned with the endurance of the Bible. In fact, as modern historical accounts have shown, the influence of the Bible continued to be felt on the political development of the United States, and remains so to this day.

Second, Bentham endorses Burke's view that this apparent failure is due, *ipso facto*, to their being 'grounded... upon the books of Moses.'⁸⁷ But although this is presented as an empirical argument, the presence of the word 'therefore' reveals it is, in fact, an ideological claim since neither Bentham nor Burke will admit to the possibility that these laws could be

⁸³ Burke's account was in its fifth edition at the time of Bentham's writing. Burns and Hart note that although the book is attribute to Edmund Burke, who revised it, the book was largely the work of his cousin, William, 25, n 2.

⁸⁴ Bentham, *Comment*, 25-26 (emphasis in original).

⁸⁵ Ibid, 200.

⁸⁶ Ibid.

⁸⁷ Ibid, 26.

successfully transplanted. It is not, then, the pragmatic argument it appears to be but an ideological claim. Bentham fails to allow for the possibility of virtue.⁸⁸

We do find, elsewhere, that Bentham applauds the effective promulgation of biblical law and its commitment to transparent justice at the city gates.⁸⁹ This is not a contradiction for Bentham because he finds these texts to be consistent with the principle of utility (see Part III section E). Yet, even here, Bentham's appreciation of biblical law is thin. He ignores additional ways his ideas could derive some support from biblical law. They include: the commitment in biblical law to disseminating knowledge of the law to all levels of society; the ideal of domestic justice; the avoidance of third party adjudication; due publicity; imaginative forms of punishment; the wise use of words and the use of motivation clauses.⁹⁰ Bentham ignores the positive intellectual and political legacy of biblical law, even when it would advance his principle of utility.

To conclude, just as Bentham constructs a definition of biblical law that does not do justice to the biblical texts so he also constructs arguments regarding the authority of biblical law that do not actually engage with the Bible's own conception of its authority. Space forbids even an outline treatment of how the Bible understands its own authority. But, at the very least, one would have to say that it goes well beyond a Benthamite notion of sovereign exercise of power to include the idea of authority as a legitimating permission that constitutes sufficient and meaningful grounds for action because it is grounded in a dimension of reality. The Bible itself bears witness to a number of interconnected realities including: (1) the existence of God; (2) the nature of God; (3) human identity and human flourishing; (4) Jesus' resurrection and (5) the mission of the people of God. Each of these realities authorizes persons to act in different ways and, in authorizing them, provides opportunities whilst at the same time setting boundaries around the freedom to act. Again, this points towards a different kind of discussion than anything Bentham is prepared to countenance. Although his arguments are presented in defence of a (supposedly) orthodox, Christian, position, Bentham applies the same tactic in regard to the authority of biblical law as he does to the definition of biblical law, that is, he constructs the arguments to suit his prior philosophy of law and

⁸⁸ For an overview of its virtue, see Jonathan Burnside, 'The Spirit of Biblical Law' (2012) 1 *Oxford J of Law & Religion* 127.

⁸⁹ Jeremy Bentham, *Works of Jeremy Bentham* (Bowring edn), vol 5, (Edinburgh, William Tait, 1843), 544.

⁹⁰ See Jonathan Burnside, 'Biblical Law and the Benthamite Ideal of Law and Society' (forthcoming).

ignores what does not fit. Bentham does not actually engage with the problem of the authority of biblical law but, rather, constructs a version to suit his own purposes.

IV BENTHAM'S GENERAL ARGUMENTS FOR OPPOSING THE AUTHORITY OF BIBLICAL LAW

It may be sufficient to leave the matter there; however, Bentham's engagement with biblical law raises the question of to what extent his views in the *Comment* cohere with his writings elsewhere. This is relevant because there is considerable scholarly debate concerning the extent to which Bentham's 'religious radicalism' relates to his 'political radicalism.'⁹¹ Moreover, if it is the case that Bentham lost interest in developing the *Comment* further, we need to know whether Bentham's opposition to the authority of biblical law in that text is consistent with his, perhaps more developed, thought elsewhere. We can identify several main ways in which it is so.

A The Neophilic Challenge

First, Bentham's opposition to biblical law is consistent with his opposition to anything that requires contemporary persons to surrender their own sense of judgment. Nothing that has either happened or was decided in the past can ground authority in the present:

Instead of being guided by their own judgement, the men of the nineteenth century shut their own eyes, and give themselves up to be led blindfold by the men of the eighteenth century... Men who have a century more of experience to ground their judgments on, surrender their intellect to men who had a century less experience, and who, unless that deficiency constitutes a claim, have no claim to preference.⁹²

Bentham's *Book of Fallacies* speaks of the 'Fallacy of Irrevocable Laws' according to which an apparently 'beneficial' law cannot be enacted because of an immutable regulation that prevents 'all succeeding legislators from enacting [such] a law.'⁹³ The end result is that '... the aggregate body of the living would remain for ever in subjection to an inexorable tyranny,

⁹¹ See, eg, the debate between Philip Schofield, 'Political and religious radicalism in the thought of Jeremy Bentham' (1999) 20 *History of Political Thought* 272 and J E Crimmins, 'Bentham's Religious Radicalism Revisited: A Response to Schofield' (2001) 22 *History of Political Thought* 494.

⁹² Jeremy Bentham, *Works of Jeremy Bentham* (Bowring edn), vol 2, (Edinburgh, William Tait, 1843), 402.

⁹³ *Ibid.*

exercised, as it were, by the aggregate body of the dead.’⁹⁴ Who, after all, can make the dead tyrant revoke his law? Consequently, all religion, including that represented by the Bible, must be swept away by science for:

In knowledge in general, and in knowledge belonging to the physical department in particular, will the vast mass of mischief, of which perverted religion is the source, find its preventive remedy.⁹⁵

Bentham’s opposition to biblical law is partly grounded in the fact it is a source of irrevocable law located in antiquity.⁹⁶ If it is bad enough to be led by laws that are a century out of date, how much worse it is to submit to those that are several thousand years old.

Here, too, Bentham’s view is recognizably modern, anticipating what we could call the neophiliac challenge to biblical law. We belittle it simply because it is old.⁹⁷ However, we may question the strength of this position. It may be easy to assume that subjects such as medicine and the natural sciences are far more sophisticated than they were three or four thousand years ago; however, the same reasoning does not apply when carried over to other fields of human endeavour, such as law. We cannot assume, *per* Bentham, that ‘new law’ is always ‘best’; that antiquity is a disqualification when it comes to legal reasoning and that the past has nothing to do with today. The reverse, in fact, is as likely to be true. For example, the political philosophy of *Deuteronomy* was so far ahead of its time that we do not find anything approaching the sort of programme it prescribes until the American founding fathers.⁹⁸ Nor should we underestimate the intellectual or the literary powers of people in biblical society.⁹⁹ Scholars have indeed found in the biblical laws and judgments a level of insight that has rarely, if ever, been surpassed.¹⁰⁰ As we have seen, Bentham himself admires the effective

⁹⁴ Ibid, [402]-[403].

⁹⁵ Jeremy Bentham, *Works of Jeremy Bentham* (Bowring edn), vol 8, (Edinburgh, William Tait, 1843), 13.

⁹⁶ As noted in n XX, above, Austin, is less radical than Bentham on this point since he does assert the genuine, independent, authority of divine law.

⁹⁷ Brent A Strawn, *The Old Testament Is Dying* (Grand Rapids, Baker Academic, 2017) for a sophisticated assessment.

⁹⁸ Berman, *Created Equal*, ch 2, Bernard Levinson, ‘The First Constitution: Rethinking the origins of rule of law and separation of powers in the light of Deuteronomy’ (2006) 27 *Cardozo L Rev* 1853.

⁹⁹ Eg Shimon Bar-Efrat, *Narrative Art in the Bible* (Sheffield, Sheffield Academic Press, 1989); Yehuda T Radday, ‘Chiasmus in Hebrew Biblical Narrative,’ in John W Welch (ed) *Chiasmus in Antiquity* (Research Press, Provo 1981) 50; Wilfred G E Watson, ‘Chiastic Patterns in Biblical Hebrew Poetry’ in Welch, *Chiasmus*, 118.

¹⁰⁰ Eg *Jubilee Manifesto*, Michael Schluter and John Ashcroft (eds) (Leicester, Inter-Varsity Press, 2005).

promulgation of biblical law and its commitment to transparent justice at the city gates.¹⁰¹ Yet Bentham does not tarry to explore the biblical texts or find other ways in which they are sound, wise or practical.¹⁰²

B The Materialist Challenge

Second, Bentham's antagonism towards biblical law is consistent with his well-documented prejudice against organised religion. Indeed, Bentham anticipates Feuerbach's *The Essence of Christianity* by several generations when he asserts that:

It is not from the attributes of the Deity, that an idea is to be had of any qualities in men: on the contrary, it is from what we see of the qualities of men, that we obtain the feeble idea we can frame to ourselves, of the attributes of the Deity.¹⁰³

It is consistent with Bentham's materialist worldview.¹⁰⁴ Bentham was especially opposed to the Church of England and recommended its 'euthanasia.'¹⁰⁵ He was determined to undermine

¹⁰¹ Jeremy Bentham, *Works of Jeremy Bentham* (Bowring edn), vol 5, (Edinburgh, William Tait, 1843) 544. This is the focus of a separate article. See Burnside, 'Benthamite Ideal' (forthcoming).

¹⁰² For examples, see Burnside, 'Spirit of Biblical Law.'

¹⁰³ Jeremy Bentham, *Works of Jeremy Bentham* (Bowring edn), vol 1, (Edinburgh, William Tait, 1843) 273.

¹⁰⁴ I refer to materialism and not, say, to atheism to recognize the way in which—formally, at least—Bentham's ontology and epistemology shaped his beliefs in regard to the existence of God (see Schofield, 'Political and religious radicalism', 272). Despite this materialism, even Bentham himself sometimes rhetorically appealed to the divine. In an early plan for an Indian legal code, Bentham wrote: 'The law is every man's best friend: to her under God he is indebted for every thing that is dear to him' (*On the Excellence of the Laws*. University College Collection Box 169, 97, no date, before 1780: cited in Mary P Mack, *Jeremy Bentham* (London, Heinemann, 78). I have not had access to the original source. For an overview of the debate as to whether Bentham was an atheist of some sort see Schofield, 'Political and religious radicalism,' 281 and Crimmins, 'Bentham's Religious Radicalism,' 494. Crimmins concludes: 'the absence of an admission of atheism [on Bentham's part] should not carry not much weight when the evidence pulling us in a different direction is so compelling' (500).

¹⁰⁵ James E Crimmins and Catherine Fuller (eds), *The Collected Works of Jeremy Bentham: Church-of-Englandism and its Catechism Examined* (Oxford, Oxford University Press, 2011), Appendix No IV. For an account of Bentham's conflict with the established Church, see Schofield, *Utility and Democracy*, 171-198; James E Crimmins, *Secular Utilitarianism: Social Science and the Critique of Religion in the Thought of Jeremy Bentham* (Oxford, Oxford University Press, 1990) 183-201 and Philip Schofield, 'Political and Religious Radicalism'.

what he called ‘Revealed Religion’, including ‘the religion of Jesus in particular.’¹⁰⁶ His declaration that ‘God’s will could not provide a standard for temporal happiness...’¹⁰⁷ clears the way for his utilitarian political agenda. All this is consistent with his attack on the Bible and the authority of biblical law.

C The Secular Challenge

Third, Bentham’s reasons for opposing the authority of biblical law are consistent with his overall objective, namely, ‘to shew how absolutely unserviceable and indeed disserviceable the idea of God is for the purpose of solving any political problem....’¹⁰⁸ The ‘Will of God’ as disclosed in the Bible cannot be used to determine what is politically right or wrong. Bentham warns of: ‘the inextricable difficulties in which those involve themselves who think to blend together things so dissevered as politics and theology and who propose to try the propriety of a political regulation by any other test than by that plain and luminous one, the principle of utility.’¹⁰⁹ It follows from this that if biblical law cannot be used to motivate conformity to the principle of utility, then it must be excluded from the public square:

To act consistently they [proponents of biblical law] must take their choice—they must be either Legislators altogether or Divines altogether. They cannot be both at once. When in the Senate, they must either shut up their Bible or their Statute book. They must either give up the notion of drawing arguments from the scriptures; or that of directing their measures to the temporal felicity of the State.¹¹⁰

Just as Bentham’s philosophy of law has shaped, however indirectly, our understanding of biblical law, so Bentham’s broader philosophy has shaped our understanding of the role that biblical law can be allowed to play to public life. His view has become our default view. His absolute exclusion of the Bible as a source of authority from the public

¹⁰⁶ See Bentham’s letter to Jean Baptiste Say, 4 August 1823: Jeremy Bentham, *The Correspondence of Jeremy Bentham*, (ed) Catherine Fuller, vol 11 (Oxford, Oxford University Press, 2000) 277.

¹⁰⁷ Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford, Oxford University Press, 2006) 175.

¹⁰⁸ Bentham, *Comment*, 22.

¹⁰⁹ *Ibid*, [27].

¹¹⁰ *Ibid*. In what sense is Bentham a secularist? For Schofield, Bentham certainly views religion as having a ‘corrupting effect upon public opinion’ (289) but denies that Bentham desired ‘enforced atheism’ (288), as opposed to Crimmins who contends that: ‘The secular Utilitarian society is one... in which the State actively works to stamp out religion’ (*Secular Utilitarianism*, 305).

square, and his complete prohibition of any biblical critique of modern law, chime with the easy-going assumptions of post-Enlightenment western thought. This is not surprising; Bentham helped to shape them. Similarly, Bentham's admittance of biblical law only to the extent that it supports utility anticipates, for example, Habermas' prevailing view that, for religious ideas to be admitted into the public square, a means must be found of 'translating' them into a form suitable to function as authoritative political reasons in lawmaking.¹¹¹ The split-level Enlightenment philosophy that assigns religion and politics to separate spheres defines our age, and is embraced as enthusiastically within the church and as outside it. Bentham's position suits all sides very well: it lets the church off the hook from having to engage or confront the wider culture and leaves political leaders free to do whatever they like without appeal to higher authority.

There may be several additional reasons why Bentham's philosophy has shaped our understanding both of biblical law and its place in modern society. One reason, I suggest, is that we actively want a secular understanding of biblical law. We want to demystify divine law so that we can make it into what we want it to be.¹¹² Bentham, *par excellence*, provides us with the tools for a secularized reading of biblical law. This is reflected in his secular definition of biblical law and his secular exposition of its (lack of) authority. Another reason is that, throughout, Bentham's motivation is to present law in such a way as to enable external critique. His definition allows us to distance ourselves from law, the better so we can stand in judgement on it. This is part of the positivist mindset, and understandably so. It is because law is heteronomous and imposes major constraints and obligations upon us that it must always be subject to external critique. Again, it is plausible to suggest that a further reason why a Benthamite understanding of law is the default in biblical scholarship is because we want to keep biblical law 'at a distance', the better to pass judgment upon it. In this respect, critical biblical scholars may be said to work with an implicit positivist stance. This too is part of Bentham's legacy.

D The Secular Prophet and his Secular *Torah*

¹¹¹ Jürgen Habermas, "'The Political': The Rational Meaning of a Questionable Inheritance of Political Theology' in Jürgen Habermas et al (eds), *The Power of Religion in the Public Square* (New York, Columbia University Press, 2011), 15-33.

¹¹² Eg Cheryl Anderson, *Ancient Laws and Contemporary Controversies* (New York, Oxford University Press, 2009).

Bentham's opposition to the authority of biblical law is consistent with his prior ideological commitment to the principle of utility. Indeed, the following declaration is made precisely in the context of discussing biblical law:

The principle of utility once adopted as the governing principle, admits of no rival, admits not even of an associate.¹¹³

The idea that the Bible constitutes a rival worldview may explain an unusual feature of Bentham's writings, and to which I here draw attention, namely, the way in which Bentham repeatedly presents his idea of a legal code (the *Pannomium*) in terms that are redolent of *torah*.¹¹⁴ This suggestion gains plausibility in the light of Bentham's earlier engagement with, and knowledge of, biblical law. Thus Bentham says in his *A General View of a Complete Code of Laws* that: 'The father of a family, without assistance, might take it [the code] in his hand and teach it to his children, and give to the precepts of private morality the force and dignity of public morals.'¹¹⁵ The imagery evokes the classic exhortation to teach *Torah* in the home:

You shall teach them diligently to your children, and shall talk of them when you sit in your house, and when you walk by the way, and when you lie down, and when you rise. You shall bind them as a sign on your hand.... (Deuteronomy 6:7-8).

In context, the importance of this verse lies in the fact that the covenant is consecrated with each member of Israel, which means that every single person is responsible for its faithful implementation.¹¹⁶ Private and public morality—in Bentham's terms—are indeed linked. This could, of course, be coincidental; the Bible does not have a monopoly on the merits of parental instruction. However, we have already noted that Bentham commends biblical law in part because of its effective promulgation; since this is a key aspect of its dissemination, Bentham can hardly have been unaware of it.

Bentham also thinks that 'under any one Government should any such rationalized body of law, to any considerable extent be established, it will form an era in the history of

¹¹³ Bentham, *Comment*, 27-28. Cf Schofield, *Utility and Democracy*, 197, who claims that: 'All men who relied on supernatural terrors to support their authority regarded pleasure as their most formidable rival, and were proportionately hostile to it.'

¹¹⁴ Schofield, *Prophet of Secularism*, describes Bentham as a 'prophet of secularism', though does not make any use of the material or the suggestions I advance here.

¹¹⁵ Jeremy Bentham, *Works of Jeremy Bentham* (Bowring edn), vol 1, (Edinburgh, William Tait, 1843) 273. Bentham, *Works*, vol 3, 209.

¹¹⁶ A well-known point given particular emphasis by Berman, *Created Equal*, 43.

Governments. It will be an example to all nations.’¹¹⁷ This claim resonates with another famous text in *Deuteronomy* where Israel’s observance of the law is explicitly to serve as an example to the nations:

Keep them and do them, for that will be your wisdom and your understanding in the sight of the peoples, who, when they hear all these statutes, will say, ‘Surely this great nation is a wise and understanding people.’ (Deuteronomy 4:6)

Not for nothing do Schofield and Harris title one volume of Bentham’s writings, on law and codification, *Legislator of the World*.¹¹⁸

Is it going too far to suggest that Bentham wants his *Pannomium* to have the status of a secular *Torah*? Lest this seem fanciful we should remind ourselves that, when Bentham authored an explicit attack on the writings of the Apostle Paul in the New Testament, he did so under the name of ‘Gamaliel Smith.’¹¹⁹ The choice of pseudonym is hardly accidental. The juxtaposition of the Jewish name ‘Gamaliel’ with the common English surname ‘Smith’ suggests Bentham saw himself as the English equivalent of the distinguished rabbi Gamaliel from the Second Temple period and who is mentioned in the New Testament. Is this the unrecognized Bentham—the secular rabbi advancing a secular *Torah*?

Perhaps not a mere rabbi, either. Bentham himself describes a dream he had around 1780:

‘I dreamt t’other-night that I was a founder of a sect: of course a personage of great sanctity and importance. It was called the sect of *utilitarians*’¹²⁰ (emphasis original).

It is Bentham who casts himself in holy language as being of ‘great sanctity’—the high priest who instructs his disciples in the sacred path of utility. Baumgardt notes it is the first time the term ‘utilitarianism’ appears in Bentham.¹²¹ If so, it is all the more telling that

¹¹⁷ Bentham Papers, University College London Library, Box lxxx, folio 36 (16 May 1821). Cited in Schofield, *Utility and Democracy*, 175, n 96. I have not had access to the original manuscript. Bentham believed that a system of laws founded upon reasons clearly announced would be propagated ‘...in all directions the instant it is created: such a system of legislation will prepare for itself a universal dominion’; *Works*, vol 1, 162.

¹¹⁸ Jeremy Bentham, ‘*Legislator of the World*’: *Writings on Codification, Law and Education* (eds) Philip Schofield and Jonathan Harris (Oxford, Clarendon Press, 1988).

¹¹⁹ Bentham, *Not Paul, But Jesus* (London, John Hunt, 1823).

<<https://archive.org/details/notpaulbutjesus00bent>>

¹²⁰ In a manuscript identified by Baumgardt as University College London Portfolio 169, Folder 13, 79; reproduced in Baumgardt, *Bentham*, Appendix I, 549. I have not had access to the original manuscript.

¹²¹ Ibid.

Bentham's 'scientific' project is birthed in such a religious context. The same dream-notes describe how, as Bentham was musing one night, an angel flew in through his window and

put into my hands a book which he said he had just been writing... it was lettered on the back Principles of Legislation... all I had to do was to cram it as well as I could down the throats of other people: (they would it had the true flavour of the fruit of the tree of knowledge of good and evil).¹²²

Bentham here makes a connection between his seminal text (*An Introduction to the Principles of Morals and Legislation*) and the 'forbidden fruit' of the Garden of Eden; the taking and the eating of which expel Adam and Eve from the presence of God. As far as Bentham's own subconscious is concerned, his work symbolizes rebellion against God. But whereas Adam and Eve voluntarily choose to take and eat of the fruit, Bentham sees it as his role to force-feed it to others.

He continues immediately with the remarkable reflection:

One day as I was musing over this book there came out to me crying a great man named LS [Baumgardt proposes Bentham's mentor Lord Shelburne¹²³] and he said unto me [:] what shall I do to be saved? I had forgot continued he: I must not talk of myself—I mean to save the nation? I said unto him: take up my book and follow me.¹²⁴

The cry of the jailer in Acts 16:30 becomes the cry of the nation, addressed not now to the apostle Paul but to Bentham. However, Bentham himself is now no longer a mere apostle or 'messenger' of the angel but sees himself as Messiah. Later, he even describes 'LS' as 'my apostle.'¹²⁵ Bentham evokes the first Adam and the last Adam. He has come to save the nation, but whereas Jesus summoned his followers to take up their cross (Matthew 16:24), Bentham bathetically offers his book. His mystical account goes on to describe an encounter with 'a man named George' (whom Baumgardt plausibly takes to refer to King George III¹²⁶) who eats a page of the book; whereupon 'there fell the scales from his eyes and not seeing what better he could do with himself, he also followed us.'¹²⁷ Here, Bentham draws upon the prophet Ezekiel consuming the divine scroll (Ezekiel 3:1-2) and Paul's miraculous healing (Acts 9:17). Finally, Bentham describes meeting a weak and pale 'Britannia' who 'had an

¹²² Ibid.

¹²³ Ibid. Shelburn was Prime Minister 1782-1783.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Ibid, 550.

issue of blood upon her for many years.’¹²⁸ Needless to say, on encountering Bentham: ‘She started up fresher, faster and more alive than ever....’¹²⁹ This pointedly recalls the woman in Mark’s *Gospel* who had suffered ‘a discharge of blood for twelve years’ (Mark 5:25) and who is healed by the merest touch of Jesus’ garments (Mark 5:27-30).

Bentham casts himself in the starring role of a meta-biblical *dramatis*. When he is not a counterfeit Jesus, he is a secular Moses. Away from dream-notes, he closes his argument in *Essay on the Influence of Time and Place in Matters of Legislation* with an explicitly biblical metaphor. Utility presents humankind with the idea of ‘a perfect system of legislation’ according to which a person

may trace the whole of its horizon and though no one now living may be permitted to enter this land of promise, yet he who shall contemplate it in its vastness and its beauty may rejoice, as did Moses, when, on the verge of the desert, from the mountain top, he saw the length and breadth of the good land into which he was not permitted to enter and take possession.¹³⁰

Whatever significance we attach to his words, it seems that even as Bentham seeks to undermine the authority of biblical law, he cannot help but ape its language and aspirations.

It would, in closing, be consistent with the Benthamite spirit of modernity to be a little psychological regarding Bentham’s handling of biblical law. After all, the ferocity of his response raises the question: where does this vitriol come from? At one level, we might see it as the passion of a reformer who is protesting against the injustice caused by vested interests controlling a conservative legal system. But this does not explain Bentham’s anger against *Torah*, nor does it account for the emotional force with which he presents his argument. It is not as though there were large numbers of ‘biblical lawyers’ or theonomists surrounding Bentham or trying to gain control of England in the eighteenth century. It is not a real agenda and when Bentham claims that not even the Church is interested in biblical law, he admits as much. So we ask again: why the hostility? I suggest that Bentham saw a parallel between his concept of law as an imaginative construct and the nature and character of *Torah*; so close to Bentham’s own ambitions in terms of its particularity, its impact and its universal sway, yet in its divinity so very different from what he wanted. Perhaps what made Bentham so angry about *Torah* is that he saw in it so much of what he wanted to achieve himself. At root, his rejection of biblical law is because he wanted Bentham, not God, to be god.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Bentham, *Works*, vol 1, 194.

VI CONCLUSION

Bentham's treatment of biblical law is flawed throughout. First, he forces biblical law onto the Procrustean bed of his legal philosophy. Second, he consistently misreads and misrepresents the biblical texts, both on their own terms and in regard to innate modes of Jewish and Christian reception and appropriation. Finally, he rejects the authority of biblical law because it rivals his ideals of modernity, secularity and utility. Yet despite their pervasive influence, Bentham's ideas concerning biblical law are well past their sell-by date. It is time to challenge his prejudices and recognize the paucity of his arguments. We need to jolt ourselves out of familiar, but misleading, assumptions about biblical law. Instead, we must pursue a revitalized understanding that is shaped, at point after point, by the covenant narrative of Israel and an essentially Jewish perception of reality—which in turn requires us to re-evaluate the place of biblical law in the modern public square.